U.S.
MAR 12 2010

No. 09-590

In the Supreme Court of the United States

THE PROGRAMMERS GUILD, ET AL., PETITIONERS

v.

JANET NAPOLITANO, SECRETARY OF HOMELAND SECURITY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

ELENA KAGAN
Solicitor General
Counsel of Record
TONY WEST
Assistant Attorney General
DAVID J. KLINE
VICTOR M. LAWRENCE
SAMUEL P. GO
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Nonimmigrant aliens admissible to the United States include an alien who "seeks to enter the United States temporarily and solely for the purpose of pursuing * * * a [full] course of study" at an approved academic institution or training program. 8 U.S.C. 1101(a)(15)(F)(i). Holders of such "F-1 status" have historically been permitted to engage in employment directly related to the course of study for a limited period of time after completion of the course of study, a practice formalized as Optional Practical Training (OPT). See 8 C.F.R. 214.2(f)(9)-(10). Some F-1 status students seeking continued employment after their F-1 status ends apply for H-1B status, which permits them to remain temporarily in the United States to perform services in a specialty occupation. See 8 U.S.C. 1101(a)(15)(H)(i)(b); 8 C.F.R. 214.2(h)(1)(ii)(B).

A 2008 Interim Final Rule of the Department of Homeland Security (1) lengthened the permissible period of OPT for students in certain fields, and (2) permitted an F-1 status student in any field with a pending H-1B petition to remain in the United States pending the start of H-1B status (or denial of the petition). See 73 Fed. Reg. 18,944 (2008) (8 C.F.R. Pts. 214, 274a).

The question presented is whether domestic job applicants are within the zone of interests protected by F-1 status for nonimmigrant alien students.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 10
Conclusion 21

TABLE OF AUTHORITIES

Cases:

Ahmed v. *United States*, 480 F.2d 531 (2d Cir. 1973) 14
Air Courier Conference of Am. v. *American Postal Workers Union*, 498 U.S. 517 (1991) 9, 11, 12, 13, 16
Association of Data Processing Serv. Orgs. v. *Camp*, 397 U.S. 150 (1970) 9
Federation for Am. Immigration Reform, Inc. v. *Reno*, 93 F.3d 897 (D.C. Cir. 1996), cert. denied, 521 U.S. 1119 (1997) 10, 15, 16
International Longshoremen's & Warehousemen's Union v. *Meese*, 891 F.2d 1374 (9th Cir. 1989) 16, 17
International Union of Bricklayers & Allied Craftsmen v. *Meese*, 761 F.2d 798 (D.C. Cir. 1985) 10, 15
Lorillard v. *Pons*, 434 U.S. 575 (1978) 13
Lujan v. *Defenders of Wildlife*, 504 U.S. 555 (1992) .. 18, 20
Lujan v. *National Wildlife Fed'n*, 497 U.S. 871 (1990) .. 12
Patel v. *INS*, 811 F.2d 377 (7th Cir. 1986) 14

Constitution, statutes and regulations:

U.S. Const. Art. III 7, 11, 18

Statutes and regulations—Continued: Page

Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.* 2
8 U.S.C. 1101(a) 13
8 U.S.C. 1101(a)(15)(D) 2, 17
8 U.S.C. 1101(a)(15)(F)(i) . . . . . *passim*
8 U.S.C. 1101(a)(15)(H) 15
8 U.S.C. 1101(a)(15)(H)(i)(b) 4
8 U.S.C. 1103(a)(3) 8, 13
8 U.S.C. 1182(a)(5)(A)(i) 10
8 U.S.C. 1182(a)(14) (1982) 15
8 U.S.C. 1182(d)(5)(A) 10
8 U.S.C. 1184(a)(1) 8, 13, 14
8 U.S.C. 1184(g)(1)(A)(vii) 4
8 U.S.C. 1184(g)(5) 4
8 U.S.C. 1184(i) 4
Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 13
Special Immigrant Nonminister Religious Worker Program Act, Pub. L. No. 110-391, 122 Stat. 4193 13
5 U.S.C. 553(b) 6, 20
5 U.S.C. 553(b)(B) 8, 20
6 U.S.C. 202 14
6 U.S.C. 557 14
8 C.F.R.:
Pt. 125:
Section 125.15(b) (1947) 3

Regulations—Continued: Page

Pt. 214 5
Section 214.2(f)(5)(iv) 3
Section 214.2(f)(9) 2
Section 214.2(f)(10) 2
Section 214.2(f)(10) (2008) 3
Section 214.2(f)(10)(ii)(A)(3) 3
Section 214.2(h)(1)(ii)(B) 4
Section 214.2(h)(9)(i)(B) 4
Section 214.2(h)(15)(ii)(B)(1) 4
Pt. 274a 5

Miscellaneous:

73 Fed. Reg. 18,944 (2008) 5
Immigration and Nationality Act Waivers, Foreign Students, Consular Functions Abroad, and Immigration Benefits to Illegitimate Children Before the Subcomm. on Immigration, Citizenship, and International Law of the H. Comm. on the Judiciary, 94th Cong., 1st & 2d Sess. (1976) 3
National Commission for Manpower Policy, *Special Rep. No. 20, Manpower and Immigration Policies in the United States* (Feb. 1978) 3
S. Rep. No. 1515, 81st Cong., 2d Sess. (1950) 3
United States Citizenship and Immigration Services, *USCIS Reaches FY 2008 H-1B Cap* (Apr. 3, 2007), http://www.uscis.gov/files/pressrelease/H1BFY08Cap040307.pdf 4

In the Supreme Court of the United States

No. 09-590

THE PROGRAMMERS GUILD, ET AL., PETITIONERS

v.

JANET NAPOLITANO, SECRETARY OF HOMELAND SECURITY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is not published in the *Federal Reporter* but is reprinted in 338 Fed. Appx. 239. The orders of the district court (Pet. App. 13a-22a, 23a-33a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 17, 2009. A petition for rehearing was denied on August 17, 2009 (Pet. App. 35a-36a). The petition for a writ of certiorari was filed on November 13, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, defines a variety of classes of nonimmigrant aliens who are admissible to the United States by virtue of their occupational, educational, official, or other status, and who may remain in the United States subject to statutory conditions and, *inter alia*, further conditions imposed by the Secretary of Homeland Security (DHS or Secretary). This case concerns an Interim Final Rule (Rule) promulgated by the Secretary regarding nonimmigrant aliens in "F-1 status," which covers certain alien students seeking to enter the United States to pursue a full course of study. In addition to addressing the conditions of F-1 status, the Rule addresses the transition that some nonimmigrant aliens may make between F-1 status and "H-1B status," which covers certain workers seeking to enter the United States temporarily to perform services in a specialized occupation.

a. F-1 nonimmigrant aliens are foreign nationals who seek to enter the United States to pursue a full course of study in approved colleges, universities, seminaries, conservatories, academic high schools, private elementary schools, other academic institutions, or language training programs in the United States. 8 U.S.C. 1101(a)(15)(F). With narrowly drawn exceptions, holders of F-1 status are not permitted to engage in employment in the United States. See 8 C.F.R. 214.2(f)(9). With the approval of United States Citizenship and Immigration Services (USCIS) in DHS, however, such an alien may engage for a limited time in employment that takes the form of practical training "in a position that is directly related to his or her major area of study." 8 C.F.R. 214.2(f)(10). One category of practical training,

known as Optional Practical Training (OPT), permits an F-1 status student to engage in such training after completion of his or her full academic course of study, a practice known as post-completion OPT. See 8 C.F.R. 214.2(f)(10)(ii)(A)(3).[1] Prior to promulgation of the Rule, F-1 status students had been eligible to seek authorization for up to 12 months of OPT. 8 C.F.R. 214.2(f)(10) (2008).

Once an F-1 status student has completed his or her full course of study, including any authorized OPT after completion of studies, the student must transfer to another approved educational institution to continue studies; change to a different nonimmigrant status; otherwise legally extend his or her period of authorized stay in the United States; or leave the United States. See 8 C.F.R. 214.2(f)(5)(iv). F-1 status students are allowed 60 days after the completion of their studies and any post-completion OPT to prepare for departure from the United States. *Ibid.*

---

[1] Practical training for foreign students has been part of immigration law since at least 1947, when the Immigration and Nationalization Service (INS) permitted practical training "for a six-month period subject to extension for not over two additional six-month periods." 8 C.F.R. 125.15(b) (1947). Congress has from time to time considered the issue of "practical training" and foreign students in the United States workforce, but has generally left the administrative framework intact as it has evolved. See, *e.g.*, S. Rep. No. 1515, 81st Cong., 2d Sess. 482-483 (1950); *Immigration and Nationality Act Waivers, Foreign Students, Consular Functions Abroad, and Immigration Benefits to Illegitimate Children Before the Subcomm. on Immigration, Citizenship, and International Law of the H. Comm. on the Judiciary*, 94th Cong., 1st & 2d Sess. 21-28 (1976); National Comm'n for Manpower Policy, *Special Rep. No. 20, Manpower and Immigration Policies in the United States* 81 (Feb. 1978).

b. H-1B nonimmigrant aliens are foreign nationals who seek to enter the United States "temporarily * * * to perform services * * * in a specialty occupation," and satisfy other criteria. 8 U.S.C. 1101(a)(15)(H)(i)(b); 8 C.F.R. 214.2(h)(1)(ii)(B). A "specialty occupation" is one that requires the theoretical and practical application of a body of specialized knowledge and a bachelor's or higher degree in the specialty as a minimum qualification. 8 U.S.C. 1184(i). H-1B status generally may be extended to a total of six years from the date that employment begins. See 8 C.F.R. 214.2(h)(15)(ii)(B)(1).

Congress caps the number of individuals who may assume H-1B status each year. That quota presently stands, with certain exceptions, at 65,000 H-1B visas per fiscal year (*i.e.*, October 1 to September 30). See 8 U.S.C. 1184(g)(1)(A)(vii) and (5). Because a petition for an H-1B visa may not be filed or approved more than six months before employment is to commence, see 8 C.F.R. 214.2(h)(9)(i)(B), a large volume of such petitions is typically received starting in early April (six months before the October 1 start of the following fiscal year's quota), causing the quota to be filled well before the start of the fiscal year. For example, USCIS received approximately 150,000 petitions for H-1B visas on the first day in April 2007 it accepted such petitions. See USCIS, *USCIS Reaches FY 2008 H-1B Cap* (Apr. 3, 2007), http://www.uscis.gov/files/pressrelease/H1BFY08Cap040307.pdf.

c. Some graduating F-1 status students seek H-1B status to remain in the United States as employees in a technical field requiring advanced study. For an F-1 status student who obtains H-1B status, the compressed H-1B petition timetable described above causes the typical alien student to experience a gap between the expira-

tion of F-1 status (after the alien graduates or ends post-completion OPT) and the commencement of H-1B status (typically early the following October)—a period during which the alien cannot lawfully be present in the United States. This problem is sometimes referred to as "Cap-Gap." The employers who employ F-1 status students on OPT—particularly those in high-demand fields of science, technology, engineering, and mathematics (STEM)—face a related set of problems: an F-1 status student on OPT may not obtain one of the limited number of H-1B visas for the coming fiscal year, and thus may be forced to leave employment; and even if the employee does obtain an H-1B visa, he may have to leave his employment and the United States during the Cap-Gap period.

To address these problems—and the immediate competitive disadvantage they created for domestic high-technology industries that need to recruit and retain skilled workers to compete globally—the Secretary promulgated an Interim Final Rule on April 8, 2008, as the 2008 Cap-Gap period affecting the greatest number of F-1 status students was beginning. The Rule (1) extended the maximum OPT period for an F-1 status student with a STEM degree to 29 months (subject, as before, to USCIS approval), and (2) permitted any F-1 status student with a pending H-1B petition to remain in the United States until he commences H-1B status or the petition is denied. Department of Homeland Security, Extending Period of Optional Practical Training by 17 Months for F-1 Nonimmigrant Students with STEM Degrees and Expanding Cap-Gap Relief for All F-1 Students with Pending H-1B Petitions, 73 Fed. Reg. 18,944 (codified at 8 C.F.R. Pts. 214, 274a) (reproduced at Pet. App. 45a-96a). The Rule does not create a new classifi-

cation of foreign workers or a new visa category, nor does it confer a new benefit on any existing class of nonimmigrant aliens; it only alters the time frame for the longstanding practical training aspect of F-1 status.

2. Petitioners—a group of three representative organizations and eleven individuals trained in computer programming, engineering or other technical fields—filed suit under the Administrative Procedures Act (APA) in the United States District Court for the District of New Jersey to enjoin the Secretary from implementing the Rule. They asserted that they would suffer from increased competition in the STEM job market from F-1 status STEM students engaged in OPT who could not be employed in the United States but for the Rule's changes to the duration of F-1 status. Petitioners contended that the Rule is not in accordance with the statute outlining F-1 status, 8 U.S.C. 1101(a)(15)(F)(i), and that promulgating the rule as an interim final rule without opportunity for advance notice and comment violated the APA's notice-and-comment requirement, 5 U.S.C. 553(b). See Pet. App. 97a-111a (amended complaint).

a. The district court denied petitioners' motion for a preliminary injunction. Pet. App. 23a-33a. It began by noting "serious questions related to [petitioners'] standing," and ordered petitioners to show cause why their complaint should not be dismissed for lack of standing. *Id.* at 26a, 33a. The district court further found petitioners' claims unlikely to succeed on the merits because Congress had granted the Secretary broad authority for carrying out the INA in general, and for specifying "the time period in which nonimmigrants can remain in the country" in particular. *Id.* at 28a. The district court

also found the other relevant factors to weigh against granting the requested injunction. *Id.* at 28a-32a.

b. Following further briefing, the district court dismissed the complaint for lack of Article III standing, for lack of prudential standing, and in the alternative for failure to state a claim upon which relief may be granted. Pet. App. 13a-22a. The district court concluded that petitioners lacked Article III standing on three independent grounds: First, they failed to establish an injury-in-fact from mere increased competition in the job market; such an injury was not "concrete and particularized" or "actual or imminent," rather than "conjectural or hypothetical." *Id.* at 15a-16a. Second, they failed to demonstrate a causal nexus between their alleged injuries and the Rule, because none of the petitioners is regulated by the Rule and they could not "show that the [Rule] is * * * responsible for their alleged injuries," given that "[petitioners] are currently unemployed or under-employed as a result of a wide range of independent factors." *Id.* at 17a & n.5. Third, the district court found petitioners' alleged injuries were not likely to be redressed by a favorable decision because invalidating the Rule would neither eliminate competition for jobs in petitioners' fields nor guarantee the improved economic conditions they sought. See *id.* at 17a-18a.

The district court further held that petitioners had not established prudential standing, for two independent reasons. First, it found that petitioners' objection to the increased competition for jobs posed by the Rule was merely a generalized grievance about government immigration policy. Pet. App. 18a. Second, the district court held that petitioners were not within the "zone of interests" protected by the Rule, which was intended to improve the domestic high-technology industry's competi-

tive position for students and workers while easing visa application procedures for OPT students, not to increase competition for such jobs or harm American workers. *Id.* at 18a-19a.

Turning in the alternative to the merits, the district court held petitioners could not establish that the Rule exceeds the Secretary's authority under 8 U.S.C. 1103(a)(3) to "establish such regulations * * * as [s]he deems necessary for carrying out h[er] authority under the provisions of [the INA]." Pet. App. 20a. The court noted that Congress specifically conferred on the Secretary authority to set the periods of time for which nonimmigrant aliens may remain in the country, and the court found it appropriate to defer to the Secretary's exercise of that authority here. *Id.* at 20a n.10 (citing, *inter alia*, 8 U.S.C. 1184(a)(1)). Finally, the district court concluded that petitioners offered no nonspeculative challenge to the Secretary's determination that "good cause" exited under 5 U.S.C. 553(b)(B) for giving the Rule immediate effect without a notice and comment period, because the public interest would have been harmed by forcing approved H-1B visa holders then in F-1 status to leave the United States upon expiration of their F-1 status. Pet. App. 21a.

3. The court of appeals affirmed the dismissal of petitioners' complaint on prudential standing grounds in an unpublished opinion. Pet. App. 1a-11a. It held (on reasoning different from the district court's) that petitioners' employment concerns were not within the zone of interests protected by 8 U.S.C. 1101(a)(15)(F)(i), the basis of their challenge.

The court explained that to establish prudential standing, a plaintiff must show that the interest it seeks to vindicate "is arguably within the zone of interests to

be protected . . . by the statute . . . in question." Pet. App. 5a (citing *Association of Data Processing Serv. Orgs.* v. *Camp*, 397 U.S. 150, 153 (1970)). For those purposes, the court noted, the "statute . . . in question" encompasses the provision allegedly violated by the administrative action and provisions having an "integral relationship" to it, but the test "should not be applied so loosely—[s]uch as by deeming each section of an act 'integrally related' to all other sections—as to render it meaningless." *Ibid.* (citing *Air Courier Conference of Am.* v. *American Postal Workers Union*, 498 U.S. 517, 529-530 (1991)).

Applying that test, the court of appeals rejected petitioners' argument that the relevant statute here is the entire INA, noting that this Court has "squarely disallowed such a kitchen-sink approach * * * and requires litigants to identify the relevant provisions with some particularity." Pet. App. 6a (citing *Air Courier Conference*, 498 U.S. at 529-30). The court of appeals found the relevant provision here to be "the one [petitioners] allege [the Secretary] actually violated: 8 U.S.C. § 1101(a)(15)(F)(i), defining F-1 status." *Ibid.* The court stressed that petitioners "never argue precisely why [their asserted competitive] injury arguably falls within the zone of interests protected by [Section] 1101(a)(15)(F)(i) in particular," and accordingly found that petitioners lacked prudential standing. *Id.* at 8a.

Canvassing the leading decisions from the D.C. Circuit addressing prudential standing to challenge decisions allowing particular classes of aliens into the United States, the court of appeals recognized that domestic workers have been held to have prudential standing when the statutory provision at issue contained "language conditioning entry into the United States on non-

interference with domestic labor conditions," Pet. App. 10a, but have been held to lack prudential standing when the particular statutory provision at issue contained no such language. See *id.* at 8a-10a. In the former category, the court of appeals pointed to *International Union of Bricklayers & Allied Craftsmen* v. *Meese*, 761 F.2d 798 (D.C. Cir. 1985), which found prudential standing in a case involving the Secretary of Labor's certification under current 8 U.S.C. 1182(a)(5)(A)(i) that admission of certain aliens would not adversely affect domestic workers' wages and working conditions. See Pet. App. 9a-10a. In the latter category, the court of appeals pointed to *Federation for American Immigration Reform, Inc.* v. *Reno*, 93 F.3d 897 (D.C. Cir. 1996), cert. denied, 521 U.S. 1119 (1997), which found no prudential standing in a case concerning an exercise of the Attorney General's parole authority under 8 U.S.C. 1182(d)(5)(A)). See Pet. App. 8a-9a.

The court of appeals concluded that such concerns were not within the zone of interests protected by Section 1101(a)(15)(F)(i) because "the F-1 status provision contains no language conditioning entry into the United States on noninterfererence with domestic labor conditions," and because Congress had not otherwise expressed its intent by, for example, adding such language to Section 1101(a)(15)(F)(i), despite many opportunities to do so. Pet. App. 10a-11a.

ARGUMENT

The court of appeals' unpublished decision is correct and consistent with other appellate decisions on prudential standing in the immigration context. Such cases arise only infrequently, and they typically turn on case-specific assessments of the particular statutory provi-

sion at issue. Moreover, as the district court recognized, prudential standing is only one of many defects in petitioners' case: they also cannot establish Article III standing and their underlying claims are meritless. Further review is not warranted.

1. The court of appeals' decision is correct and does not reflect any disagreement among the courts of appeals concerning prudential standing under the particular statutory provision at issue here.

a. Petitioners contend that the court of appeals erred both in determining that the prudential standing inquiry here focuses on 8 U.S.C. 1101(a)(15)(F)(i), rather than "the immigration laws" writ large, see Pet. 18-20, and in concluding that domestic worker protection is not within the zone of interests protected by Section 1101(a)(15)(F)(i), see *id.* at 20-23. Neither contention is correct.

As the court of appeals correctly recognized, petitioners' position "that the relevant statute is the entire INA" is squarely foreclosed by this Court's decision in *Air Courier Conference of America* v. *American Postal Workers Union*, 498 U.S. 517 (1991). *Air Courier Conference* concerned the Postal Service's adoption of a rule that permitted private carriers to compete with it in certain international markets; postal employees challenged the rule, arguing that it would harm their interests by reducing the volume of postal work for them to perform. See *id.* at 519-521. The Court recognized that the statutes governing the Postal Service's monopoly (and the challenged rule) were enacted along with statutes governing postal labor-management relations, see *id.* at 528-529, but explained that "to hold that the relevant statute in this case is the [entire package of laws], with all its various provisions * * * could deprive the zone-

of-interests test of virtually all meaning." *Id.* at 529-530 (internal quotation marks omitted). The same is true here: portions of the immigration laws doubtless embrace domestic worker protection, see Pet. App. 9a-10a, but a court cannot "accept this level of generality," *Air Courier Conference*, 498 U.S. at 529-530.

Instead, "the relevant statute [under the APA] of course, is the statute whose violation is the gravamen of the complaint." *Air Courier Conference*, 498 U.S. at 529 (quoting *Lujan* v. *National Wildlife Fed'n*, 497 U.S. 871, 886 (1990)) (brackets in original). Here, that is 8 U.S.C. 1101(a)(15)(F)(i)—the only immigration provision cited in petitioners' amended complaint. See Pet. App. 97a-111a. As the court of appeals put it, "[t]he relevant provision here is the one [petitioners] allege [the Secretary] actually violated: 8 U.S.C. 1101(a)(15)(F)(i), defining F-1 status." *Id.* at 6a.

The court of appeals correctly concluded that 8 U.S.C. 1101(a)(15)(F)(i) does not embrace worker protection within its zone of interests. The foremost indication of that is the provision's text: There is no language in 8 U.S.C. 1101(a)(15)(F)(i) that prohibits an F-1 status student from working; indeed, if there were, students participating in OPT would be in violation of 8 U.S.C. 1101(a)(15)(F)(i).[2]

---

[2] It may be that petitioners' contrary view—that the absence of statutory language authorizing F-1 status students to work absolutely bars such aliens from working—would bring their claims within the zone of interests protected by the provision. But that interpretation cannot be correct, because it would create at least two grave contradictions. *First*, a canon that provisions of the INA prohibit anything not expressly permitted would nullify the Secretary's authority to administer the INA, because the Secretary would have no discretion to authorize anything not already permitted by the INA itself. Congress has clearly indicated otherwise in delegating broad authority to the Secre-

Text aside, there is no other indication that domestic worker protection is within the zone of interests protected by 8 U.S.C. 1101(a)(15)(F)(i). As petitioners concede (Pet. 11), practical training has been permitted for over 60 years. See Pet. App. 10a; pp. 2-3 and note 1, *supra*. Yet despite this long history of F-1 status students engaging in practical training, Congress has repeatedly amended Section 1101(a) (most recently on October 10, 2008, after promulgation of the Rule) without addressing domestic worker protection. See Pet. App. 10a (citing Special Immigrant Nonminister Religious Worker Program Act, Pub. L. No. 110-391, § 2(a)-(b), 122 Stat. 4193). That acquiescence has great force when, as here, administration of the statute in question is committed in large measure to agency discretion. Cf. *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978).[3]

---

tary to administer the INA and set the terms and conditions of nonimmigrant aliens' presence in the United States. See 8 U.S.C. 1103(a)(3), 1184(a)(1). *Second*, petitioners' reliance on negative implication would "deprive the zone-of-interests test of virtually all meaning." *Air Courier Conference*, 498 U.S. at 530. Any plaintiff with an injury-in-fact would also have prudential standing because either his grievance would be addressed by the text of the statute (and thus be within the statute's zone of interests), or it would not (in which case, petitioners would say, the omission bespeaks an interest in withholding permission).

[3] Petitioners' asserted nontextual evidence of congressional intent (Pet. 21-22) is similarly unpersuasive. The Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359, addressed foreign students generally (among many other subjects). IRCA is irrelevant because this case concerns what students in F-1 status are permitted to do when *lawfully* present in the United States, while IRCA is largely concerned with aliens who are *not* lawfully present in the United States. More to the point, nothing in IRCA draws a connection between domestic labor protections and F-1 status students. The 1990 House Judiciary Committee Report petitioners cite (see Pet. 21) is unhelpful because it is not connected to any statu-

b. Petitioners cite several cases in support of their claim that the unpublished decision below conflicts with other courts of appeals' immigration decisions. Pet. 18, 24-28. None, however, shows any active disagreement among the circuits.

First, petitioners cite *Ahmed* v. *United States*, 480 F.2d 531, 532 (2d Cir. 1973), and *Patel* v. *INS*, 811 F.2d 377 (7th Cir. 1986), for the proposition that "protection of domestic workers was among Congress's concerns in enacting and re-enacting the F-1 status provision." Pet. 24. But as an initial matter, neither case raised or addressed a question of prudential standing. That aside, although both cases concerned F-1 visa holders, the illegality of the alien's conduct in each case traced to his violation of a separate condition on his presence in the United States that he not obtain employment without prior approval—a condition not in 8 U.S.C. 1101(a)(15)(F)(i), but imposed instead by a regulation.[4] See *Patel*, 811 F.2d at 378 & nn.2-3; *Ahmed*, 480 F.2d at 532-533 & nn.1-2. At most, therefore, *Ahmed* and *Patel* illustrate the general proposition that sometimes the immigration laws are administered with a view to protection of domestic workers. But as explained above, this Court's zone-of-interests jurisprudence—*Air Courier Conference* in particular—does not permit a would-be plaintiff to frame the inquiry at such a high level of generality.

Second, petitioners take issue with the court of appeals' reading of D.C. Circuit prudential standing cases.

---

tory language controlling F-1 status; at most, it speaks to Congress's intent in revising the terms of other nonimmigrant alien statuses.

[4] Such regulations were formerly promulgated under the authority granted to the Attorney General in 8 U.S.C. 1184(a)(1); that authority has been transferred to the Secretary by 6 U.S.C. 202 and 557.

See Pet. 24-28. But the court of appeals correctly explained how its holding was consistent with both *International Union of Bricklayers & Allied Craftsmen* v. *Meese*, 761 F.2d 798 (D.C. Cir. 1985) (*Bricklayers*), and *Federation for American Immigration Reform, Inc.* v. *Reno*, 93 F.3d 897 (D.C. Cir. 1996) (*FAIR*), cert. denied, 521 U.S. 1119 (1997). See Pet. App. 8a-11a.

Bricklayers, on the one hand, found domestic workers to have prudential standing in a case challenging the issuance of visas allegedly in violation of 8 U.S.C. 1101(a)(15)(H) and 1182(a)(14) (1982). It reached that conclusion because those provisions permit aliens to enter the United States "if unemployed persons capable of performing [particular] service or labor cannot be found in this country," and "the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed." *Bricklayers*, 761 F.2d at 800. As the D.C. Circuit explained, "[t]he wording of the statute gives a clear indication of the interests which [Section 1182(a)(14) (1982)] was designed to protect" and "indicates congressional concern for and a desire to protect the interests of the American workforce." *Id.* at 804.[5]

FAIR, by contrast, rejected Florida residents' argument that they had prudential standing to challenge the

---

[5] Petitioners are mistaken in asserting (Pet. 27) that *Bricklayers* did not concern an alleged violation of the "H" visa provisions. The plaintiffs in *Bricklayers* "charge[d] that the [challenged instruction] promulgated by the INS violates the pattern set forth in [8 U.S.C. 1101(a)(15)(H) and 1182(a)(14) (1982)] * * * as to the proper manner by which nonimmigrant aliens shall be admitted to perform labor." 761 F.2d at 801. By contrast, petitioners' amended complaint asserts only that the Secretary has improperly exercised her authority under 8 U.S.C. 1101(a)(15)(F)(i). See Pet. App. 97a-111a.

Attorney General's parole and adjustment of status of Cuban nationals. The prudential standing argument was premised on the theory that the immigration laws protected people in localities likely to be affected by an influx of immigrants. See *FAIR*, 93 F.3d at 900-904. The D.C. Circuit rejected that argument because the plaintiff "ha[d] pointed to neither language in the statute on which it relies" nor "legislative history that even hints at a concern about regional impact." *Id.* at 901.

The decision below is consistent with both *Bricklayers* and *FAIR*. In all three cases, the courts ascertained the zone of interests of the provision in question by looking to the statutory language and other indicia of congressional intent. Petitioners selectively quote the decisions in an attempt to suggest a conflict of legal principles with the Third Circuit.[6] But the different outcomes simply reflect different interests protected by different provisions, revealed when the courts focused on "the provisions under which the suit was brought" and "provisions having an 'integral relationship' with [those] provisions," *FAIR*, 93 F.3d at 904 (quoting *Air Courier Conference*, 498 U.S. at 530).

Finally, the decision below is also consistent with the holding on prudential standing in *International Longshoremen's & Warehousemen's Union* v. *Meese*, 891 F.2d 1374 (9th Cir. 1989) (*ILWU*). There, the Ninth Circuit held, in a two-sentence ruling, that protection of

---

[6] For example, petitioners quotes *FAIR*'s statement that "[w]e do not believe that an affirmative signal of Congressional intent to permit a suit is *required* for a finding of prudential standing," Pet. 26 (quoting 93 F.3d at 902), but they ignore the *FAIR* court's very next statement, "But we have also held that the absence of a clear indication of congressional intent to *forbid* the suit does not automatically confer standing on the plaintiff." *Ibid.*

domestic harbor worker jobs was within the zone of interests of 8 U.S.C. 1101(a)(15)(D), which permits nonimmigrant alien vessel crewmembers to enter the United States, so long as they are serving "in any capacity required for normal operation and service on board a vessel." Although Section 1101(a)(15)(D) is in some respects phrased similarly to Section 1101(a)(15)(F)(i), the former is expressly directed at regulating the employment of nonimmigrant alien crewmembers, while the latter does not evince concern for employment at all. Moreover, the Ninth Circuit's reasoning in *ILWU* was that "[a] primary purpose of the immigration laws * * * is to protect American laborers." 891 F.2d at 1379. This Court rejected that sort of generalized zone-of-interests inquiry in *Air Courier Conference*, *supra*. *Air Courier Conference* was decided after *ILWU*, and given an opportunity, the Ninth Circuit may reexamine that aspect of *ILWU* in light of *Air Courier Conference*.

c. In all events, cases raising prudential standing questions under particular provisions of the immigration laws arise infrequently, and petitioners admit as much. See Pet. 19 (characterizing the opinion below as "the first post-1990 decision on foreign student work authorization"). Petitioners suggest that the court of appeals adopted a *per se* rule that a plaintiff has prudential standing only if he can point to express language placing him within the statute's zone of interests. See Pet. 19, 25, 27. The court of appeals' reasoning is not so categorical; it considered other indicia of congressional intent, such as Congress's longstanding acquiescence in administrative rules permitting F-1 status students to work. See Pet. App. 10a.

Thus, this case does not present any large question of prudential standing doctrine. At bottom, petitioners

simply disagree with the court of appeals' assessment of the zone of interests protected by a particular provision of the INA, and posit that a generalized interest in worker protection in the immigration laws suffices to confer prudential standing on them. Such a narrow and infrequently arising question does not merit this Court's review, especially when addressed, as in this case, in an unpublished decision.

2. Even if there were an active dispute among the courts of appeals implicating the question presented, this case would be an undesirable vehicle for reaching a question of prudential standing because—as the district court recognized below—petitioners lack Article III standing and their underlying claims are meritless.

a. As the district court cataloged in some detail, Pet. App. 14a-18a, petitioners lack Article III standing to challenge the Rule:

> [T]he irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Lujan v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992) (internal quotation marks, alterations, and citations omitted). Petitioners can show none of these.

Injury in fact. Petitioners have suffered no injury in fact because they cannot identify a job for which they were not hired, or from which they were fired. Instead, they assert that they suffer an injury from increased competition for jobs from nonimmigrants. But in the courts below, petitioners cited, and the government is aware of, no case holding that increased competition for employment is sufficiently "concrete and particularized" and not "hypothetical" to qualify as an injury in fact. And indeed, to recognize such an injury would render the injury-in-fact requirement almost meaningless in the context of challenges to government regulations, because the very nature of regulations is to affect the conduct of—and hence competition among—individuals or business. See Gov't C.A. Br. 25-31.

Causal connection. Petitioners also cannot establish a causal connection between the Rule and their putative injury. If they are unable to obtain employment on the terms they desire, that can be due in only the most attenuated and speculative way to a regulation that permits a limited class of workers (about 0.2% of the job pool cited by petitioners, see Gov't C.A. Br. 37) to remain employed in the United States for a few months longer than they were permitted prior to the Rule. See *id.* at 31-35.

Redressability. For the same reasons that petitioners cannot show that their alleged injuries are caused by the Rule, they cannot show how a decision invalidating the Rule would improve their job prospects. With or without the Rule, employers could still prefer or recruit OPT students, OPT students could still seek H-1B visas,

and petitioners could still have difficulty finding a job or have their wages depressed. See Gov't C.A. Br. 36-39.[7]

b. Petitioners' claims also fail on the merits. See Gov't C.A. Br. 44-60. As noted above (see p. 6, *supra*), petitioners brought a procedural APA claim asserting that the Secretary improperly dispensed with the advance notice-and-comment requirement of 5 U.S.C. 553(b), and substantive claims asserting that the Rule conflicted with 8 U.S.C. 1101(a)(15)(F)(i).

As the district court recognized (Pet. App. 19a-21a, 26a-28a), both claims are meritless: The substantive claim fails because the Rule merely sets the "time" for which, and the "conditions" under which, a class of nonimmigrant aliens is permitted to be present in the United States—matters that are delegated to the Secretary, see note 4, *supra*. The fact that the condition in question (practical training) has long been a feature of immigration law only underscores the lawfulness of the Secretary's regulation of this field. As for petitioners' procedural claim, the APA permits dispensing with the usual notice-and-comment procedures "when the agency for good cause finds * * * that [such procedures] are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. 553(b)(B). Here, confronted with an impending Cap-Gap period affecting many foreign students, the need for the United States to be more competitive in attracting foreign students, and domestic businesses' need to recruit and retain skilled STEM workers, the Secretary found that the public interest would

---

[7] Petitioners would also lack standing because they assert only a "generally available grievance about government"; the interest they propose to vindicate is shared by the public as a whole, and the relief they seek would "no more directly and tangibly benefit[] [them] than * * * the public at large." *Defenders of Wildlife*, 504 U.S. at 574.

be disserved by allowing another visa cycle to run (as a full notice-and-comment rulemaking would have necessitated). See Pet. App. 69a-71a. In the face of that reasonable finding, petitioners "failed to alleged facts beyond a speculative level that tend to establish that [the Secretary] acted without good cause in giving the [Rule] immediate effect." *Id.* at 21a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELENA KAGAN
Solicitor General
TONY WEST
Assistant Attorney General
DAVID J. KLINE
VICTOR M. LAWRENCE
SAMUEL P. GO
Attorneys

MARCH 2010